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STATUTE.

28 U. S. C., Sec. 1254(1) and 2101(c) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 960

WILLIAM STANGER GRAY, one of the Lloyd's Underwriters,

and

ORION INSURANCE COMPANY, LTD., Insurance Company Member of the Institute of London Underwriters,

Petitioners,

v.

NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT, NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York is reported at 144 F. Supp. 356 and the opinion of the Court of Appeals for the Second Circuit is reported at 240 F. 2d 460.

Jurisdiction

Judgment of the Court of Appeals was entered on January 16, 1957. Petitioner's motion for re-hearing was denied in an order entered February 5, 1957. The petition for a writ of *certiorari* was filed on May 1, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1) and 2101(c).

Question presented:

Whether the Court below erred in finding that the loss in suit was within the coverage of a marine insurance policy insuring respondent railroad against losses to goods in its possession as carrier and to cars of other railroads "for which it may be liable" and against loss to its own cars while on its carfloats in specified waters through perils of the sea.

Statute Rules and Regulations

This case does not turn upon the construction of any statute rule or regulation of the United States.

Statement***

About 12:15 a. m. in the early morning of February 10th, 1951, respondent railroad's Carfloat 60, carrying 13 gondola cars, 12 of which contained steel concrete re-inforcing rods, lurched at its moorings in the basin off respondent's Mott Haven Yard when a mooring line snapped. The head cars

*** References to the Appendix to the Petition for *Certiorari* are indicated by Pet. A. followed by the page number references to Trial Minutes printed in the Appendix to Libelant-Appellant's brief below are indicated by Lib. A. followed by page number.

on the float's starboard track rolled over the bow (Lib. A. 134-5). The remaining cars and their contents either fell into the basin or upset onto the decks of the float (Lib. A. 136). The stipulated loss in suit consisted of amounts paid by respondent to satisfy its liabilities for the resultant damage to the rod shipment, and cars of other railroads and to repair some damage to its own cars. The suit for that loss was brought by respondent against petitioners upon two substantially identical policies of marine insurance (Lib. Ex. 1 and 2, Exhibit folder). Petitioners have agreed to be treated as if they were the sole underwriters.

The pertinent words of the printed form of the policies are:

> "TOUCHING the Adventures and Perils which we the Assurers are content to bear * * * in this Voyage they are of the Seas * * * and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said goods and Merchandises or any Part thereof * * *".

The pertinent words of the typewritten rider affixed to both policies are:

> "* * * on all goods * * * including articles excepted in the printed part of this policy * * * belonging to the assured or held by it in trust or custody as carrier or forwarder, and for which it may be liable, while the same is in or on cars or on floats owned or employed by said Railroad Company, and/or while said cars are being hauled on or off of said vessel * * *".
>
> * * * * * *
>
> "This policy covers accidents occurring between the 1st January, 1951 and the 31st December, 1951, both days inclusive, Eastern Standard time."

There is no dispute with respect to facts or circumstances of the accident deemed material by the Court below.

The trial Court characterized the inaction of certain of respondent's employees as negligence to which it added an epithet. It denied recovery on the ground that the cause of the accident was negligence and not "perils of the sea" (Pet. 3A). On appeal, the Circuit Court of Appeals for the Second Circuit held in substance that the undisputed facts demonstrated that the loss did result from a peril of the sea and that it was immaterial whether or not negligence of respondent's employees had exposed the assured adventure to loss through such perils. It reversed the District Court's decision and directed entry of a decree for the stipulated loss and interest. Such a decree on mandate has been entered.

Petitioner has conceded in all courts that the policy contains no applicable warranty of seaworthiness, express or implied (Pet. 8). The English policies are primarily insurance against liability. *Joyce and others* v. *Kinnard*, (1871) L.R. Q.B. Cases 78. The losses in suit stem principally from liability.

The record would not support and the trial Court did not make a finding that the respondent was guilty of wilful misconduct as that phrase has been interpreted in the marine insurance case law. The Court of Appeals expressly found that respondent was not guilty of such conduct (Pet. 5A, 6A).

The ground urged in the petition for granting *certiorari*, thrice re-stated, is that this Court should now settle the law with respect to the extent to which an assured owes a marine insurer a duty to exercise care with respect to insured property, i.e., in effect warrants that the assured and its employees will not be negligent. While the petition does not say so, it would appear that petitioner does not

seriously urge this Court to review the holding by the Court of Appeals that the loss in suit was immediately and proximately caused by perils of the sea. It confines criticism to the Court of Appeals' refusal to treat the alleged negligence exposing the insured adventure to sea perils as a defense to the claim on the policy.

The decision and opinion of the Court of Appeals as to the nature of the cause of loss is unassailable. The insured property was dumped and damaged through lurching of a carfloat brought about by changes in buoyancy (Lib. A. 91). The changes were due to the snapping of a mooring line when the float settled which started or accelerated a movement of cars on the starboard track down the sloping deck and over the bow (Lib. A. 134-5). The sudden lightening of the starboard side when the head cars rolled off the float resulted in further car dumping lurches (Lib. A. 74). The settling was caused by water flowing through deck ventilators after the bow had slowly submerged as the result of the float's trim by the head and leakage or the "creeping" of the cargo of loaded cars down the slope of the deck caused by movements of the float, or a combination of these causes (Lib. A. 149-151, 55, 70, 51-52, 69-73).

The underlying reason for the accident was the failure of those in charge of the float to restore her to an even keel by pumping water into the stern compartments or by other means. This could have been done at any time before water reached the ventilators a half hour or so before the dumping. The float stayed afloat for days when restored to an even keel after the accident without repair or pumping (Lib. A. 21). This error in float management resulted from a failure to appreciate the danger because of incorrect evaluations of reports, observations, etc., the basic reason most marine disasters occur (Pet. A. 9a). Nothing need be added to the demonstration in the opinion below that the

"concatenation of fortuitous circumstances" responsible for the loss in suit constituted a sea peril. This brief will not further labor the point.

Argument

Respondent submits that the law relating to the duties and implied warranties of the assured with respect to negligence under marine insurance policies is well settled on all points involved in this case and has been accurately re-stated and correctly applied by the Court of Appeals.

The rule set down by Judge Story in *Waters* v. *The Merchants' Louisville Insurance Co.*, (1837) 11 Pet. (36 U. S.) 213 has been frequently re-stated and applied. Judge Story said:

> "* * * a loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy, unless there be some other language in it which repels that conclusion. Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy. There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud." (p. 221).

The assured in a marine policy does not impliedly contract that the assured or its employees will not be guilty of some negligence that might subject the insured property to loss through sea peril insured against under our law. *Orient Ins. Co.* v. *Adams*, (1887), 123 U. S. 67; *General Mutual Ins. Co.* v. *Sherwood*, (1852) 55 U. S. 361 (14 How.); *Olympia Canning Co.* v. *Union Marine Ins. Co.* (9th Cir., 1926), 10 F. (2d) 72; *Nome Beach Lighterage & Trans-*

portation Co. v. *Munich Assur. Co. Ltd.* (C. C. N. D. Cal., 1903), 123 F. 820; *Crescent Ins. Co.* v. *Sunflower River Packet Co.* (1891), 69 Miss. 208, 13 So. 254; *Chas. Clarke & Co.* v. *Mannheim Ins. Co.*, (1919 Tex.) 210 S. W. 528, not officially reported.

No such implication has been found in such policies issued in England when construed by the British courts. *The Xantho*, (1887) 12 App. Cas. 507; *Canada Rice Mills Ltd.* v. *Union Marine and General Ins. Co.* (1941) App. Cas. 55; *Mountain* v. *Whipple* (1921) 1 App. Cas. 615; *Hamilton Fraser & Co.* v. *Pandorf & Co.* (1887) 12 App. Cas. 518; *The Stranna*, 1937 Probate 130.

New York and Cuba Mail S.S. Co. v. *Continental Ins. Co.*, (2 Cir. 1941) 117 F. (2d) 404, *cert. den.* 313 U. S. 580 cited on page 12 of the petition involves an express provision excluding from coverage liabilities incurred with the fault or privity of the assured. If the Petitioners wished to exclude from their policies liabilities caused by fault it was a simple matter to so provide.

In the absence of such provision marine liability policies have been construed as insuring against liability due to faults of the assured resulting in unseaworthiness and against which the assured could not limit liability. *Sorenson* v. *Boston Insurance Co.* (4th Cir., 1927), 20 F. (2d) 640 *cert. den.* 275 U. S. 555; *Hanover Fire Ins. Co.* v. *Merchants Transport Co.* (9th Cir., 1926), 15 F. (2d) 946; *Eagle Star & British Dominions Ins. Co.* v. *Geo. A. Moore & Co.*, (9 Cir. 1925) 9 F. (2d) 296.

The English policies in suit are basically liability policies. *Joyce & Co.* v. *Kinnard*, 7 L.R., Q.B. Cas. 78.

The rule contended for by petitioner would effectively prevent large marine carriers from making provision for operational losses and liabilities through marine insurance and would result in the setting up of self-insurance reserves

against such losses. Large commercial carriers must make surer provision to pay losses from marine accidents and disasters than insurance construed as petitioners urge. Such construction would require assureds to incur the cost, expense and loss of time incident to litigating questions as to whether *delicts* of employees or supervisors contributed to the loss and constituted negligence or negligence characterized by an epithet. It would make payment of the loss dependent upon the unpredictable outcome of such litigation. Surely it would not be socially desirable to bring about the bankruptcy of carriers involved in disasters traceable in some part to supervisory fault through a rule of law voiding insurance against liability under such circumstances. The courts and state legislatures have clearly indicated that public policy favors valid insurance against liability for faults however gross in automobile and truck operation. The policies in suit are closely analogous to such policies.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Cletus Keating,
Attorney for Respondent.

Edward L. Smith,
of Counsel.

JUN 13 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 960

WILLIAM STANGER GRAY, one of the Lloyd's Underwriters,

and

ORION INSURANCE COMPANY, LTD., Insurance Company Member of the Institute of London Underwriters,

Petitioners,

v.

NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

DANIEL L. STONEBRIDGE
For Petitioner

(A) Motion for Leave to File Petition for Rehearing

Petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case entered on May 20, 1957. Rehearing is sought, as is pointed out more fully in the annexed petition, because the decision of the Court of Appeals herein is repugnant to fundamental justice and usurps for an appellate court the determination of factual issues properly within the province of the trial court.

June 12, 1957

.....

Daniel L. Stonebridge
Counsel for Petitioners

(B) Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Petitioners pray that this Court grant rehearing of its order of May 20, 1957, denying the petition for writ of certiorari, 353 U. S. , and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition docketed May 1, 1957, herein.

Reasons for Granting Rehearing and Issuing the Writ

This petition for a rehearing or reconsideration of the denial by this Court of the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is based upon the following:—

The sole cause of the loss for which recovery is sought by the respondent was the failure of respondent's managerial personnel to take remedial action in the face of a known perilous situation when the means of preventing the

loss were readily available. No insurer intends to cover losses so caused.

While petitioners insured against perils of the sea they did not insure against all losses occurring *on* the sea.

There is absolutely no evidence of any *fortuity* associated with the loss for which recovery is sought. There is no contradiction of the fact that respondent's managerial shoreside personnel were warned from time to time over a nine hour period that the carfloat was in danger. Yet they did nothing to prevent the loss when the means to correct the situation were available and the loss could have been prevented by the use of a minimum of effort without any risk to the respondent.

Basically, standing by and permitting the destruction of property with a resultant acquisition of a contractual right or the elimination of a contractual duty is repugnant to fundamental justice.

This is exactly what the respondent herein did. It knew that Carfloat 60 was in a perilous situation, that portable pumps were available to correct the situation, that loading crews and equipment were available to shift the loading to obtain a proper trim. It did nothing except watch the loss occur and look to its underwriters for payment.

The trial court in its opinion stated that there was not a scintilla of evidence of any fortuity; that, "the immediate cause, and the only cause of the accident, was libelant's gross negligence"; "libelant's managing agents had full knowledge of a situation which merely had to continue to exist in order to result in the accident which eventually did occur"; "Libelant, by 6:00 P. M., through the gross negligence of its managing employees had rendered Carfloat No. 60 unseaworthy and had placed the railroad cars and the goods insured by respondents in such a perilous position that loss was inevitable in the absence of remedial action". These conclusions, essentially factual in nature, were ex-

pressed by the trier of the facts who saw the witnesses and heard the testimony. They are fully supported by the record. They are not "clearly erroneous" and the Court of Appeals acted improperly in substituting itself for the trial court.

Respectfully submitted

.....

Daniel L. Stonebridge
Counsel for Petitioners

Certificate of Counsel

I hereby certify that the foregoing petition for hearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 38 of the Rules of this Court.

.....

Counsel for Petitioners